LEE TAIN TSHUNG

v.

HONG LEONG FINANCE BHD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: S-02-392-1997]
13 MARCH 2000

CIVIL PROCEDURE: *Interest - Judgment debt - Whether court could grant interest of 18% on judgment sum - Whether rate of interest agreed to by parties*

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Judgment in excess of what was due - Whether a nullity - Whether judgment was a default judgment - Rules of the High Court 1980, O. 2 r. 1(1) - No distinction between nullity and irregularity - Delay - Whether delay unreasonable and unexplained - Power of court to amend judgment to reflect correct amount - Rules of the High Court 1980, O. 92 r. 4 - Whether judgment in contravention of any statute*

CIVIL PROCEDURE: *Irregularity - Nullity and irregularity - Rules of the High Court 1980, O. 2 r. 1(1) - Non-compliance with the rules - Whether a nullity - No distinction between nullity and irregularity*

On the respondent's application, the High Court struck out the defence of the appellant and entered judgment against him. Several years later, the respondent commenced execution proceedings against the appellant. This prompted the appellant to file a summons-in-chambers for a stay of the execution proceedings and to set aside the judgment. At the hearing, the appellant abandoned his prayer for stay but proceeded with the prayer to set aside the judgment. The High Court dismissed the summons-in-chambers. The appellant appealed. The issues raised were: (a) the High Court had no power to grant interest at 18% per annum on the judgment sum; and (b) the judgment recorded was for an amount in excess of what was due as it included tax indemnity. Therefore, the appellant contended that it was a nullity and ought to be set aside *ex debito justitiae*. Meanwhile, the respondent raised the issue of eight years' delay on the part of the appellant in moving the court to set aside the judgment.

Held:

Per NH Chan JCA (Abu Mansor Ali JCA concurring)

[1] Order 2 r. 1(1) Rules of the High Court 1980 ('RHC') had done away with the old distinction between nullities and irregularities so that a failure to comply with the requirements of the RHC would be treated as an irregularity and would not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order in the proceedings. Therefore, nowadays words like "nullity", "void" and "voidable" should not be used to describe judgments or orders that are made by a court of unlimited jurisdiction in the course of contentious litigation.

[2] The appellant was not entitled to have the judgment, even though it was irregular, set aside under O. 2 r. 2 RHC because his application to set aside was not issued within a reasonable time.

[3] The court in recognising the irregularity of the incorrect amount on the judgment, had power under O. 2 r. 1(2) RHC to correct the error in the judgment by amending it to the correct amount regardless of who had initiated the application to have the judgment set aside.

[4] Where a judgment has been entered for too much, the court may amend the judgment under O. 2 r. 1(2) RHC even though it is not permitted to set aside the judgment by O. 2 r. 2(1) because of unreasonable delay.

[5] The present case was not one where the court had acted in contravention of any statute when it gave judgment for the respondent in 1987. Therefore, the appellant's submission that he could rely on O. 92 r. 4 RHC to have the judgment set aside because it was entered for an amount in excess of what was actually due was misconceived.

[6] In the present case, the appellant's only recourse was to apply under O. 2 r. 2 RHC to have the irregular judgment set aside. He was unable to apply under any other provision of the RHC because the judgment was not a default judgment.

Per Ahmad Fairuz JCA (Abu Mansor Ali concurring)

[1] The amendment to O. 42 r. 12 RHC 1980 (RHC) clearly empowers the High Court to order an interest above 8% per annum on a judgment sum if the rate has already been agreed upon by the parties.

[2] As the order on interest was made in 1987, the amended O. 42 r. 12 RHC would be applicable.

[3] The argument on tax indemnity had no merit as the appellant had not been in any way prejudiced or made to suffer any loss as a result of the mistake of including the tax indemnity sum into the judgment sum.

[4] As the appellant failed to give any explanation for the delay in moving the court to set aside the judgment, the court had no valid reason to excuse the delay.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Atas permohonan responden, Mahkamah Tinggi membatalkan pembelaan perayu dan memasukkan penghakiman terhadapnya. Beberapa tahun kemudian, responden memulakan prosiding perlaksanaan terhadap perayu. Ini menyebabkan perayu memfailkan satu saman dalam kamar memohon penggantungan prosiding perlaksanaan dan penghakiman diketepikan. Semasa perbicaraan, perayu mengabaikan permohonan untuk penggantungan tetapi meneruskan dengan permohonan untuk mengenepikan penghakiman. Mahkamah Tinggi menolak saman dalam kamar tersebut. Perayu merayu. Isu-isu yang dibangkitkan oleh perayu adalah, (a) Mahkamah Tinggi tidak mempunyai bidangkuasa untuk membenarkan faedah pada kadar 18% setahun ke atas jumlah penghakiman; dan (b) penghakiman yang direkodkan itu adalah untuk satu jumlah yang lebih besar daripada jumlah yang sepatutnya kerana ia termasuk cukai tanggungrugi. Dari itu, perayu mengatakan bahawa ianya adalah satu pembatalan dan wajar diketepikan *ex debito justitiae*. Sementara itu, responden membangkitkan isu kelewatan lapan tahun pada pihak perayu dalam mengenepikan penghakiman tersebut.

Diputuskan:
Oleh NH Chan HMR (Abu Mansor Ali HMR bersetuju)

[1] Aturan 2 k. 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 (KMT) telah memansuhkan perbezaan lama di antara pembatalan dan luar aturan jadi satu kegagalan untuk mematuhi peruntukan-peruntukan KMT akan dianggap sebagai satu luar aturan dan ianya tidak akan membatalkan prosiding, apa-apa langkah yang diambil dalam prosiding atau mana-mana dokumen, penghakiman atau perintah dalam prosiding. Dari itu, sekarang ini, perkataan-perkataan seperti “pembatalan”, “tak sah”, dan “boleh dibatalkan” tidak harus digunakan untuk menyifatkan penghakiman atau perintah yang dibuat oleh sebuah mahkamah yang tidak terhad bidangkuasanya semasa perlangsungan pertikaian litigasi.

[2] Perayu tidak berhak, walaupun penghakiman tersebut satu luar aturan, mengenepikannya di bawah A. 2 k. 2 kerana permohonannya untuk mengenepikan penghakiman itu tidak dikeluarkan dalam masa yang munasabah.

[3] Mahkamah dalam menyedari luar aturan dalam bentuk kesilapan amaun dalam penghakiman, mempunyai kuasa dibawah A. 2 k. 1(2) untuk membetulkan kesilapan di dalam penghakiman tersebut dengan memindanya kepada amaun yang betul tidak kira siapa yang memulakan permohonan untuk mengenepikan penghakiman itu.

[4] Bila mana satu penghakiman telah dimasukkan untuk jumlah yang lebih besar, mahkamah boleh meminda penghakiman tersebut dibawah A. 2 k. 1(2) walaupun ia tidak dibenarkan untuk mengenepikan penghakiman dibawah A. 2 k. 2(1) kerana kelewatan yang tidak munasabah.

[5] Kes semasa bukanlah satu kes di mana mahkamah telah bertindak bertentangan dengan sebarang statut apabila ia memberikan penghakiman kepada responden pada tahun 1987. Dari itu, hujahan perayu bahawa beliau boleh bergantung kepada A. 92 k. 4 untuk mengenepikan penghakiman tersebut kerana ianya dimasukkan untuk jumlah yang lebih besar dari jumlah yang sepatutnya adalah salah.

[6] Dalam kes semasa, satu-satunya jalan yang terbuka kepada perayu hanyalah untuk memohon dibawah A. 2 k. 2 untuk mengenepikan penghakiman luar aturan itu. Beliau tidak boleh memohon dibawah mana-mana peruntukan KMT yang lain kerana penghakiman tersebut bukan satu penghakiman ingkar.

Oleh Ahmad Fairuz HMR (Abu Mansor Ali HMR bersetuju)

[1] Pindaan kepada A. 42 k. 12 KMT dengan jelasnya membolehkan Mahkamah Tinggi memerintahkan faedah pada kadar lebih dari 18% setahun ke atas jumlah penghakiman jika kadar tersebut telah dipersetujui oleh pihak-pihak.

[2] Memandangkan perintah berkenaan faedah itu dibuat pada 1987, A. 42 k. 12 KMT yang dipinda adalah terpakai.

[3] Hujahan mengenai cukai tanggungrugi tidak mempunyai merit memandangkan perayu tidak diprejudiskan dalam apa cara sekalipun atau menanggung sebarang kerugian akibat dari kesilapan memasukkan cukai tanggungrugi ke dalam jumlah penghakiman.

[4] Oleh kerana perayu gagal memberi sebarang penjelasan mengenai kelewatan dalam memohon mahkamah mengenepikan penghakiman tersebut, mahkamah tidak mempunyai sebarang alasan yang kukuh untuk memaafkan kelewatan tersebut.

[Rayuan ditolak.]

Case(s) referred to:
Armitage v. Parsons [1908] 2 KB 410 ***(refd)***
Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(refd)***
Bernstein v. Jackson [1982] 1 WLR 1082 ***(refd)***
Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 ***(dist)***
Dubai Bank Ltd v. Galadari (No 4) (The Times 23 February 1990) ***(refd)***
Hadkinson v. Hadkinson [1952] P 285 ***(refd)***
Harkness v. Bell's Asbestos & Engineering Ltd [1967] 2 QB 729 ***(refd)***
Hughes v. Justin [1894] 1 QB 667 ***(refd)***
Isaacs v. Robertson [1985] AC 97 ***(refd)***
Lai Yoke Ngan v. Chin Teck Kwee [1997] 3 CLJ 305 ***(refd)***
Lam Kong Co Ltd v. Thong Guan & Co (Pte) Ltd [1985] 1 CLJ 412 ***(refd)***
Marsh v. Marsh [1945] AC 271 ***(refd)***
Metroinvest Anstalt v. Commercial Union Assurance plc [1985] 1 WLR 513 ***(refd)***
Muir v. Jenks [1913] 2 KB 412 ***(refd)***
Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 263 ***(refd)***
Singh v. Atombrook Ltd [1989] 1 All ER 385 ***(refd)***
Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 ***(refd)***
Tuan Hj Ahmad Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 ***(refd)***
White v. Weston [1968] 2 QB 647 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 2 rr. 1(1), (2), 2(1), (2), O. 13 rr. 8, 12, O. 14 rr. 1, 11, O. 18 r. 19, O. 19 r. 9, O. 35 r. 2(1), O. 42 rr. 12, 13, O. 81 rr. 1, 7, O. 92 r. 4

Companies Act 1965 [UK], s. 725(1)
Limitation Acts 1939 & 1954 [UK], ss. 1, 2(1)
Limitation Act 1963 [UK], s. 1
Rules of the Supreme Court 1965 [UK], O. 2 r. 1, O. 13 r. 9, O. 128 r. 1(1)

Other source(s) referred to:
Supreme Court Practice 1997, vol 1, paras 2/1/1, 2/2/3

For the appellant - TG Lim (TY Lee with him); M/s TG Lim & Partners
For the respondent - Wong Suk Anne; M/s Skinner Lind Willie Wong & Chin

[Appeal from High Court, Kota Kinabalu; Suit No: K11 of 1986]

Reported by Izzaty Izzuddin

JUDGMENT

NH Chan JCA:

The plaintiff Hong Leong Finance Bhd had sued Tamparuli Granite Quarry (Sabah) Sdn Bhd and its guarantors, Sek Ann Thong and Lee Tain Tshung for arrears of rental in a leasing agreement. The action was commenced in the High Court at Kota Kinabalu in Sabah and Sarawak.

The plaintiff had applied under O. 18 r. 19 of the Rules of the High Court 1980 to strike out the defence of the defendants and for judgment to be entered against them. The High Court on 16 February 1987 granted the application and judgment was obtained against all the defendants for RM1,211,523.66. The defendants did not appeal against this judgment. In fact it was not until very much later and after the plaintiff had taken execution proceedings on the judgment that the third defendant Lee Tain Shung (Lee) decided to apply in 1995 to set aside the judgment against him. His summons in chambers was dated 16 January 1995. On 10 June 1997 the judge in chambers dismissed Lee's application to set aside the judgment. Lee appeals to the Court of Appeal.

Irregular (Voidable) Judgments And Those Irregular Judgments That Were In The Olden Days Described As "A Nullity" Or "Void"

Before us, Mr TG Lim for Lee (now the appellant) argues that the judgment was obtained for an amount in excess of what was due and it is therefore a nullity (or void). Counsel contends that the appellant is entitled as of right (or in Latin, *ex debito justitiae*) to apply to have the judgment that the plaintiff (now the respondent in this appeal) had obtained against him on 16 February 1987 set aside. However, Mr Lim was not astute enough to know that nowadays words like "nullity", "void" and "voidable" should not be used to describe judgments or orders that are made by a court of unlimited jurisdiction in the course of contentious litigation. I would like to take this opportunity to point out that, "Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it upon application to that court; if it is regular it can be set aside by an appellate court upon appeal if there is one to which an appeal lies.": see below per Lord Diplock at p. 103 in *Isaacs v. Robertson (PC)*. "It is settled law that the expressions "nullity", "void" and "voidable" are wholly inappropriate to describe an order made by a court of unlimited jurisdiction", said Gopal Sri Ram JCA in *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479, CA, at 488. It is misleading to seek to draw a distinction between orders that are "void" (in the sense that they can be ignored with impunity by those persons who are affected by such

orders) and orders that are "voidable" (which may be enforced unless and until they are set aside). In *Issacs v. Robertson* [1985] AC 97, PC, Lord Diplock who delivered the judgment of the Board (Lord Diplock, Lord Keith of Kinkel, Lord Roskill, Lord Brightman and Lord Templeman) said, at 102, 103:

> Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are "void" in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are "voidable" and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the descriptions "void" and "voidable" respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in the appeals *Marsh v. Marsh* [1945] AC 271, 284 and *MacFoy v. United Africa Co Ltd* [1962] AC 152, 160; but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall into a category of court orders that can simply be ignored because they are *void ipso facto* without there being any need for proceedings to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind, what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.
>
> The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such *an order is either irregular or regular. If it is irregular it can be set aside by the court that made it upon application to that court; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies.* (emphasis added)

Isaacs v. Robertson was an appeal to the Judicial Committee of the Privy Council from the Court of Appeal of Saint Vincent and the Grenadines in the West Indies where, apparently, they did not have anything similar to O. 2 r. 1 of our Rules of the High Court 1980 (RHC). Yet the Privy Council has held that it is misleading to seek to draw a distinction between

orders that are "void" so that they can simply be ignored by those persons to whom they are addressed without there being any need for proceedings to have them set aside, and orders that are "voidable" and may be enforced unless and until they are set aside. In this country we have RHC O. 2 r. 1(1) which had (as the Privy Council also had) done away with the old distinction between nullities and irregularities so that a failure to comply with the requirements of the Rules of the High Court would be treated as an irregularity and would not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order in the proceedings (see O. 2 r. 1(1)).

Order 2 r. 1(1) and (2) is as follows:

> 1(1) **Where,** in beginning or purporting to begin any proceedings or **at any stage in the course of** or in connection with **any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of** time, place, manner, form or **content or in any respect, the failure shall be treated as an irregularity and shall not nullify** the proceedings, any step taken in the proceedings, or **any** document, **judgment or order therein.** (emphasis added)
>
> (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any documents, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

For convenience I have underlined the words in r. 1(1) to show that a judgment which failed to comply with the requirements of the Rules of the High Court would be treated as an irregular judgment and it would not be nullified by it. RHC O. 2 r. 1(1) sets out the provision that any "failure to comply with (the Rules of the High Court) ... shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein". Although a judgment obtained as a result of a failure to comply with statutory requirements is not covered by this rule.

The provisions in RHC O. 2 r. 1 are in *pari materia* with the English Rules of the Supreme Court 1965 (RSC) Ord. 2 r. 1. So that, in this country as in England the distinction between nullity and irregularity disappears (at least, in regard to "a failure to comply with the requirements of these rules"): see *Harkness v. Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729, at 735, 736, CA where Lord Denning MR said:

> In my opinion, therefore, Blain J was in error, and so was James J. This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. It can at least be asserted that "it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation." (See *Pontin v. Wood* [1962] 1 QB 594, per Holroyd Pearce LJ at 609). That could not be said in 1963: see *In re Pritchard, decd* [1963] Ch. 502. But it can be in 1966. The rule does it.
>
> This is plainly a case where we should put the matter right under the new provisions and the leave should be treated as granted properly.
>
> I would allow the appeal accordingly. (emphasis added)

In the case of *Harkness v. Bell's Asbestos & Engineering Ltd* as the plaintiff's claim would have been barred by the Limitation Acts of 1939 and 1954, his solicitors, before issuing a writ, applied *ex parte* to a district registrar under s. 1 of the Limitation Act 1963 for leave of the court to proceed for the purposes of the Act. On 16 April 1964 the district registrar issued an order that s. 2(1) of the Act of 1939 should not afford a defence to the plaintiff's proposed claim for damages against his employers. On 17 April 1964 a writ was issued. The defendants applied to set aside the district registrar's order on the grounds (i) that he had no jurisdiction to make it because the jurisdiction to grant such leave was vested in a judge in chambers by RSC, O. 128 r. 1(1), and (ii) that any order should have been for leave to proceed for the purposes of s. 1 of the Act of 1963 (and not in the form as ordered by the registrar). On 10 May 1966, Blain J, believing that the registrar's order was a nullity, made no order on the application. The plaintiff then applied under RSC, O. 2 r. 1 to rectify the registrar's order by asking the judge in chambers to treat the registrar's order as valid (see O. 2 r. 1(2) which provides that "the court may ... exercise its powers under these rules ... to make such order (if any) dealing with the proceedings generally as it thinks fit."). On 11 July 1966 James J dismissed the plaintiff's application. The plaintiff appealed. The Court of Appeal allowed the appeal and held that the application to the district registrar constituted "proceedings" within RSC, O. 2 r. 1(1) under which the court had the power (see O. 2 r. 1(2)) to correct the errors made by the registrar as irregularities by making an order that treated the leave as having been granted properly (see above, *ibid,* per Lord Denning MR at 736).

However, unlike *Harkness v. Bell's Asbestos & Engineering Ltd* (above) the plaintiff in the present case did not apply under RHC, O. 2 r. 1(2) to correct the judgment by asking the judge to exercise his powers under r. 1(2) to amend the judgment sum to the correct amount. In the old days before O. 2 r. 1(2) took its present form, it was thought that it was the duty of the creditor if he obtained a wrong judgment to have it set right and not for the debtor to do so. See per Buckley LJ in *Muir v. Jenks* [1913] 2 KB 412, CA, at 415:

> Both the Master and the judge appear to have thought that the debtor himself ought to have taken steps to get the judgment corrected and that for default in so doing he was now precluded by delay from having the judgment set aside. In my opinion that is wrong. It is the duty of the creditor if he obtains a wrong judgment to have it set right. It is not the duty of the debtor against whom he has obtained the judgment to do so.

But that has all been changed by the present O. 2 r. 1(2) which gives the court the power to correct the judgment by amendment regardless of who makes the application. An irregular step, judgment or order remains irregular until application is successfully made to the court to correct it: *Metroinvest Anstalt v. Commercial Union Assurance plc* [1985] 1 WLR 513; [1985] 2 All ER 318, CA. This is how it was put by Cumming-Bruce LJ, *ibid* ([1985] 1 WLR at 520; [1985] 2 All ER at 323):

> In my view it is plain that on the ordinary language of Ord. 2, r. 1 where there is a failure to comply with the rules, what has been done or left undone remains irregular until the court takes action either to kill the particular proceeding or to cure it ...
>
> As I construe Ord. 2, r. 1, from the moment a step in proceedings is tainted by irregularity through failure to comply with the rules, the irregular step or document (judgment or order) remains irregular *inter partes* until the matter has been brought before the court and the court has decided in which way to exercise the jurisdiction conferred by Ord. 2, r. 1(2). Ord. 2, r. 2 does not restrict the power of the court in the sense of restricting its jurisdiction, and does not have the effect of suspending the irregularity until the application under Ord. 2, r. 2 is made. The purpose and effect of Ord. 2, r. 2 is to prescribe the procedure if and when an opposite party decides to apply so that the court on recognising the irregularity, may exercise its powers under rule 1(2) by taking the action of killing or curing the irregular proceeding (judgment or order).

A judgment or order of the court which is irregular, however, cannot be ignored with impunity by the person to whom it is addressed; it must be observed unless and until it is set aside or rectified by amendment under O. 2 r. 1(2). In other words, all irregular judgments or orders will still be in force until they are set aside but this will require an application to the

court that made them. The application is made under the Rules of the High Court that deal expressly with proceedings to set aside judgments or orders for not complying with the requirements of the rules (RHC). Such an application can be made under O. 2 r. 2 or it can be made under another provision of the rules (RHC) that may be applicable independently of or in conjunction with O. 2. But if the application to set aside the irregular judgment or order is made under O. 2 r. 2, then O. 2 r. 2(2) sets out the procedure for such an application. Order 2 r. 2(2) states:

> 2(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.

And under r. 2(1) the application would not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregular judgment or order. The irregular judgment or order remains irregular *inter partes* until it has been brought before the court so that the court on recognising the irregularity, may exercise its powers under O. 2 r. 1(2) by taking the action of setting aside or curing the irregular judgment or order. Once the matter has been brought before the court, O. 2 r. 1(2) gives the court the widest possible power in order to do justice, whether or not an application under O. 2 r. 2 is before it.

It is to be noted that O 2 r. 1(2) provides the court with a discretion "to set aside either wholly or in part ... any ... judgment or order (in the proceedings) or exercise its powers under these rules ((RHC)) to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings as it thinks fit". This rule gives the court the widest possible power in order to do justice (*Metroinvest Anstalt v. Commercial Union Assurance Co. plc, supra,* [1985] 1 WLR at 521; [1985] 2 All ER at 324). This is what Cumming-Bruce LJ, *ibid*, said:

> I would say that in most case the way in which the court exercises its powers under O. 2 r. 1(2) is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. **But I would construe Ord. 2 r. 1(2) as being so framed as to give the court the widest possible power in order to do justice.** (emphasis added)

And Slade LJ put it in this way, he said (*ibid.* [1985] 1 WLR at 522, 523; [1985] 2 All ER at 325):

> Where, in the course of proceedings, the court finds that a failure of the nature referred to in O. 2 r. 1(1) has occurred, which has not been waived by the other party either expressly or by implication, it is given by O. 2 r. 1(2) a choice of courses to pursue at its own discretion, whether or not an application

> under O. 2 r. 2 is before it. In such a situation, in the exercise of its discretion under r. 1(2), it may either adopt the more draconian course of setting aside wholly or in part the proceedings in which the failure occurred, or the relevant step taken in those proceedings or the relevant document or order; alternatively, it may 'make such order ... dealing with the proceedings generally as it thinks fit.' The last mentioned words are, in my opinion, manifestly wide enough to empower it to make a dispensing order waiving the relevant irregularity: see, for example, *Leal v. Dunlop Bio-Processes International Ltd* [1984] 1 WLR 874, 880F, per Stephenson LJ.

He continued (*ibid*, [1985] 1 WLR at 523; [1985] 2 All ER at 325, 326):

> ... Once a party to litigation has been guilty of a failure of the nature mentioned in O. 2 r. 1(1) which has not been waived by the other party, the court, in my opinion, has a general discretion under paragraph (2) to make such consequential orders dealing with the proceedings generally as it thinks fit, as Stephenson LJ, in the *Leal* case [1984] 1 WLR 874, 882D, expressly recognised.

Furthermore, he also said (*ibid*, on the same page):

> Furthermore, I accept that prejudice or lack of prejudice to the other party to the litigation is clearly a highly relevant matter in considering the interests of justice; it may be the all-important one.

The court, when exercising its discretion to correct irregularities under O. 2 r. 1(2), will perform its task in this way. "In most cases the way in which the court exercises its powers under O. 2 r. 1(2) is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the irregularity, but the rule is so framed as to give the court the widest possible power. Hence prejudice, or lack of prejudice, although often the all-important factor in the exercise of the discretion, is not always the only relevant factor (*Metroinvest Anstalt v. Commercial Union Assurance Co. plc* [1985] 1 WLR 513; [1985] 2 All ER 318, CA).": the *Supreme Court Practice* 1997, vol. 1, para. 2/1/1, Exercise of discretion to correct irregularities.

Even though the court has the widest possible power to do justice, not all irregularities can be cured under O. 2 r. 1(2). There is no power to remedy irregularities of a more fundamental kind. Sometimes the irregularity is so fundamental a defect in procedure that the court is unwilling to exercise the discretion in O. 2 r. 1(2) to disregard the irregularity. In such a case, the court will decline to exercise its power under r. 1(2) to make any dispensing order waiving the irregularity. "The power given to the court by O. 2 r. 1 is a power to cure irregularities consisting of failures to comply with the rules. There is no power to remedy failures of a more

fundamental kind. Thus the requirement that the plaintiff be in existence at the date of the commencement of the proceedings is a basic principle of law rather than a requirement of the rules. If an action is brought by a non-existent company, it must therefore be struck out: except in the case of a mere misnomer, the non-existent plaintiff cannot apply to have another person joined as a co-plaintiff (*Dubai Bank Ltd v. Galadari (No. 4), The Times,* 23 February 1990).": the *Supreme Court Practice* 1997, vol. 1, para. 2/1/1, Exercise of power under the rule. In *Bernstein v. Jackson* [1982] 1 WLR 1082; [1982] 2 All ER 806, the failure to renew a writ for service is an irregularity which constitutes such a fundamental defect in procedure that the court would not exercise the discretion to disregard it under O. 2 r. 1(2), since O. 6 r. 8 provides a compendious set of rules for the extension and renewal of writs. In *Lam Kong Co. Ltd v. Thong Guan & Co. (Pte) Ltd* [1985] 2 MLJ 429 the plaintiff in an action for specific performance of a contract for the sale of land had entered a default judgment against the defendant when it failed to enter an appearance. The plaintiff had acted contrary to the requirements of O. 13 r. 12 which is for the action to be set down on a motion for judgment. The Supreme Court held that the irregular judgment constituted such a fundamental defect that it was not curable. This is what Abdul Hamid CJ (Malaya) said, at 431:

> It is to be observed that the effect of the rule (O. 13 r. 12) was to disentitle the respondents from entering default judgment on a writ specially indorsed for specific performance. They were to proceed in the manner provided by the Rules and that was to set down the action on motion for judgment. It was only on the further step being taken that it was open for the court or judge to consider giving judgment as upon the claim the court or judge should consider the respondes to be entitled. At that point of time, therefore, judgment in default was not only given in breach of r. 12 but had resulted in a failure to comply with r. 11 of O. 27. In the circumstances, we are constrained to hold that the breach and the non-compliance were not merely irregularities but fundamental defects. **The fundamental defect was not, in our view, curable as the effect of the breach and non-compliance was to defeat the right of the other party to the action.** (emphasis added)

In *White v. Weston* [1968] 2 QB 647, CA, it was held (Russel and Sachs LJJ) that a judgment should be set aside unconditionally *ex debito justitiae* without referring to the new rule (ie, RSC O. 2 r. 1(2)) because it was a plain case of the defendant being totally unaware of the proceedings at all. Both Russel and Sachs LJJ thought that one did not get much assistance from considering whether a judgment is to be described as having been obtained irregularly or whether it was a nullity. Russel LJ said, *ibid,* at 659 (and Sachs LJ agreed with him, *ibid,* 662):

> I do not myself attach importance to the question whether it is proper to label a judgment obtained in circumstances such as this as "irregular" or "a nullity". The defect is in my judgment so fundamental as to entitle the defendant as of right, *ex debito justitiae*, to have the judgment set aside.

Yet in *Tuan Haji Ahmad Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30, FC, Edgar Joseph Jr FCJ is found to be still using the outdated label "nullity" to describe an irregularity in the judgment that is so fundamental that a court will refuse to exercise its power under O. 2 r. 1(2) to waive the irregularity. This kind of case entitles the defendant as of right, *ex debito justitiae*, to have the judgment set aside. This is what he said, at 36:

> It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute **or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity.**

But then what he did was to copy the phrase from this passage in the *Supreme Court Practice 1995*, vol. 1, para. 2/1/1. For convenience I have underlined the relevant part.

It reads:

> ... the above distinction between nullity and mere irregularity disappears (see *Harkness v. Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729, p. 735, CA) at any rate in regard to 'a failure to comply with the requirements of these rules,' though it may still be that there are other failures to comply with statutory requirements **or other improprieties so serious as to render the proceedings in which they occur, and any order made therein, a nullity.**

And he then went on to hold, in giving the judgment of the court at 43, that:

> ... the default judgment was by reason of uncertainty, a nullity, and the amendment made by the judge to it by deleting the words 'on monthly rests', did not cure that defect.

Here again he used the word "nullity" which was inappropriate. It could be phrased in such a way as to avoid using the word "nullity", *viz*, that the default judgment was by reason of uncertainty serious enough to render it incurable. The court, in this kind of case, would decline to exercise its powers under O. 2 r. 1(2) to cure the irregularity. We do not get much assistance from using the words "nullity" and "void" to describe a judgment that has been obtained with a defect which is so fundamental as to entitle the defendant as of right, *ex debito justitiae*, to have the judgment set aside. In fact, the use of these words adds to the confusion.

Nowadays it is no longer appropriate to use the expressions "nullity" and "void" to describe an irregularity in a judgment or order which constitutes such a fundamental defect in procedure that the court will not exercise its discretion under O. 2 r. 1(2) to disregard the irregularity. See Abdul Hamid CJ (Malaya) in *Lam Kong Co. Ltd v. Thong Guan & Co. (Pte) Ltd, supra,* where he said, at 431, "the breach and the non-compliance were not merely irregularities but fundamental defects. The fundamental defect was not ... curable as the effect of the breach and non-compliance was to defeat the right of the other party to the action." See also Gopal Sri Ram JCA in the Federal Court case of *Lai Yoke Ngan v. Chin Teck Kwee* [1997] 2 MLJ 565. He said at 578:

> It must be borne in mind that the default judgment in question is merely irregular and not a nullity. Orders and judgments made or entered by such a court, in private law litigation, in the exercise of its coercive power upon default of a party to a suit, even when made or entered in breach of a rule of court or of practice, are merely irregular. They are not nullities. And it is quite wrong to describe them as such.

And he concluded thus, at 581:

> The proposition that is to be gathered from the decision of *Lam Kong* is this. A judgment in default of appearance entered by a plaintiff, or, for that matter, a counterclaiming defendant, in breach of the terms of O. 13 r. 6(1), may be set aside *ex debito justitiae*. And on an application of the proposition to the facts of that instant appeal, there is no doubt whatsoever that the judgment in default obtained in the present case was fundamentally flawed.

Before O. 2 took its present form, the previous rule had been O. 70 r. 1. the terms of which had been:

> Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any **proceedings** void unless the court or a judge shall so direct, but such **proceedings** may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit. (emphasis added)

This is explained by Cumming Bruce LJ in *Metroinvest Anstalt v. Commercial Union, CA, supra*. He referred to the old O. 70 r. 1 and said ([1985] 1 WLR at 518; [1985] 2 All ER at 322):

> As a matter of construction of that rule it was clear that where there had been irregularity by non-compliance with the rules, the consequence would be that by reason of the irregularity, unless the court so directed, the power of the court when an irregularity was noted was either to set the **proceedings** aside or to amend them or otherwise deal with them in such a manner and on such terms as the court or judge thought fit. (emphasis added)

And he gave his conclusion, *ibid*, thus:

> But under the old rule there was a difficulty. What was the position if the purported proceedings had such a character that they could not be regarded as legal proceedings within the rule at all? In that case, there were no proceedings; they were a nullity. So the court had to decide, if the purported proceedings had not complied with the rule of court, whether the court could exercise its jurisdiction under O. 70 r. 1. In those cases in which it was decided that the characteristics of the purported proceedings were such that they should be reguarded as a nullity, and so void, there was nothing for the court to exercise jurisdiction upon for the purposes of O. 70 r. 1.
>
> It is quite clear from *Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, 735 that the mischief at which the revision of the rules was aimed was to remove the distinction between irregular purported proceedings which were *ab initio* a nullity from irregular proceedings which were not *void ab initio*. The content of O. 2 is designed to enable the court, whenever faced with anything done or left undone in proceedings which constitutes a failure to comply with the requirements of the rules, to exercise powers conferred by the rules without having first to decide whether the jurisdiction conferred by the rules applies at all.

So the position, before O. 2 took its present form, was this. Before, under the old O. 70 r. 1 there were purported proceedings that were *ab initio* a nullity. So that there were no proceedings at all; they were a nullity and so void. There was nothing for the court to exercise jurisdiction upon for the purposes of O. 70 r. 1. On the other hand, there were irregular proceedings that were not *void ab initio*, so that, if they had not complied with the rules of court, the court could exercise its jurisdiction upon them for the purposes of O. 70 r. 1. Lord Goddard in *Marsh v. Marsh* [1945] AC 271 (PC) explained the effect of a void judgment or order. He said, at 284:

> A considered number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. *Anlaby v. Praetorius* [1888] 20 QBD 764 and *Smurthwaite v. Hannay* [1889] AC 494 are leading examples of the former, while *Fry v. Moore* [1889] 23 QBD may be said to illustrate the latter. *The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside.* (emphasis added)

So that in the old days of O. 70 r. 1 the court had to decide whether the jurisdiction conferred by the rules applies. In those cases where there had been improprieties so serious as to render the proceedings in which they occur, and any order made therein, a nullity, and so void, there was nothing for the court to exercise jurisdiction upon for the purposes of O. 70 r. 1.

But in the cases where the proceedings were not void *ab initio* and there had been irregularities by non-compliance with the rules, the court could exercise the jurisdiction conferred on it by O. 70 r. 1 upon them.

Proceedings, and any judgment or order made therein, that were a "nullity" or "void" did not exist at all. They were non-existent. A judgment that was a nullity was non-existent so that it could be ignored with impunity by the person to whom the order was addressed; see per Lord Goddard in *Marsh v. Marsh, supra,* at 284. But then as a matter of law there is no category of court orders that can simply be ignored because they are void *ipso facto* without there being any need for proceedings to have them set aside. It is in order to avoid such an anomaly that O. 2 took its present form by removing the distinction between irregular purported proceedings, judgments or orders which were *ab initio* a nullity from irregular proceedings which were not void *ab initio.*

Irregular Judgments Or Orders Are Enforceable Until Set Aside

Under the old O. 70 r. 1 irregular judgments or orders that were a nullity or void could be ignored with impunity by those persons to whom the orders were addressed. See per Lord Goddard in *Marsh v. Marsh, supra,* where he said this (at 284), "The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it ... while if it be voidable only the party affected must get it set aside". But, as pointed out by Lord Diplock in *Isaacs v. Robertson (PC), supra,* at 102, "it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside." Lord Diplock went on to show that the distinction between 'void' and 'voidable' orders is not supported by authority. He said, *ibid,* at 102, 103:

> *Dicta* that refer to the possibility of there being such a distinction between orders is which the descriptions 'void' and 'voidable' respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in the appeals *Marsh v. Marsh* [1945] AC 271, 284 and *MacFoy v. United Africa Co. Ltd* [1962] AC 152, 160; but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall into a category of court orders that can simply be ignored because they are *void ipso facto* without there being any need for proceedings to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind; ...

Judgments and orders of the High Court are either irregular or regular. An irregular judgment or order of the High Court can be set aside by the court that made it upon application to that court. Except for default judgments or judgments that have been obtained against absent parties, a regular judgment or order of the High Court can only be set aside by an appellate court upon appeal to it if there is a court to which an appeal lies.

There is no known category of court orders that can be ignored on the ground that they are void without there being any requirement for proceedings to have them set aside. There is, however, a category of orders of the High Court in which a person affected by the order is entitled to apply to have it set aside *ex debito justitiae* (as of right) in the exercise of the inherent jurisdiction of the court that made it without his being required to have recourse to the Rules of the High Court that deal expressly with proceedings to set aside judgments or orders for irregularity of procedure. This type of orders usually refers to judgments or orders that have failed to comply with statutory requirements.

An irregular judgment or order of the High Court, even one where the defect is so fundamental that the court will not exercise the discretion to disregard the irregularity under O. 2 r. 1(2) cannot be ignored with impunity by the party to whom the judgment or order is addressed. Such a judgment or order remains in force unless and until it has been set aside by the court that made the judgment or order. This is how Lord Diplock put it in *Issacs v. Robertson (PC), supra,* at 101, 102:

> The main attack by the defendant on the Court of Appeal's judgment was based on the contention that as a consequence of the operation of O. 34 r. 11(1)(a) of the Rules of the West Indies Associated States Supreme Court (rev. 1970) the order made by the High Court granting that interlocutory injunction on 30 May 1979 was a nullity; so disobedience to it could not constitute a contempt of court. Glasgow J accepted this contention; the Court of Appeal rejected it, in their Lordships' view correctly, upon the short and well established ground that an order made by a court of unlimited jurisdiction, such as the High Court of Saint Vincent, must be obeyed unless and until it has been set aside by the court. For this proposition Robotham JA (Acting) cited the passage in the judgment of Romer LJ in *Hadkinson v. Hadkinson* [1952] P. 285, 288:
>
> > It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. 'A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it ... It would be

> most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and void --- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question: that the course of a party knowing of an order, which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.' (per Lord Cottenham LC in *Chuck v. Cremer* [1846] Cooper temp. Cottenham 205, 338.) Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court ... is in contempt and may be punished by committal or attachment or otherwise.
>
> This, in their Lordships' view, says all that needs to be said upon this topic. It is in itself sufficient reason for dismissing this appeal.

The passage in the judgment of Romer LJ in *Hadkinson v. Hadkinson* [1952] P. 285, 288 which was cited with approval by Lord Diplock in *Isaacs v. Robertson*, see above, has been endorsed by the Supreme Court in *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100 (see per Hashim Yeop A Sani CJ (Malaya) at 102).

There is no such thing as an irregular judgment or order of the High Court that can be ignored with impunity by those persons who are affected by the judgment or order. A judgment or order of the High Court is either irregular or regular. An irregular judgment or order of such a court can be enforced unless and until it is set aside. An application has to be made to the court that made the irregular judgment or order to have such judgment or order set aside. Such an application is made to the court that made it. The application is made under the Rules of the High Court that deal expressly with proceedings to set aside judgments or orders for irregularity under O. 2 r. 2 or under other provisions of the rules (RHC) without the need to have recourse to O. 2 r. 2. However, in a certain type of case (such as a judgment or order which did not comply with statutory requirements) an application can be made to have the irregular judgment or order set aside *ex debito justitiae* (as of right) under the inherent jurisdiction of the court without the applicant being required to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity. For this, see below under the heading "Applications to set aside irregular judgments or orders under the inherent jurisdiction of the court without being required to have recourse to the rules that deal expressly with proceedings to set aside judgments or orders for irregularity" and O. 92 r. 4.

Setting Aside Irregular Judgments For Irregularity Of Procedure Under Order 2 And Setting Aside Of Default Judgments Under Other Provisions Of The RHC

(1) Setting Aside Irregular Judgments For Irregularity Of Procedure Under Order 2

It must be noted that O. 2 deals expressly with, *inter alia,* irregular judgments or orders which could either be set aside or rectified under r. 1(2). But, in other parts of the rules (RHC) there are also other provisions for setting aside judgments or orders of the High Court without the need to have recourse to O. 2. I shall deal with this aspect in a moment (see below under the heading "(2) setting aside of default judgments under other provisions of the RHC".

There are two preconditions that must be fulfilled or it will be fatal to an application to have a judgment or order set aside for irregularity of procedure under O. 2. The grant of the application is only permissible if it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity (O. 2 r. 2(1)). I must now quote O. 2 r. 2:

> 2(1) **An application to set aside for irregularity** any proceedings, any step taken in any proceedings or **any** documentation, **judgment or order** therein **shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.** (emphasis added)
>
> (2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice or motion.

Rule 2(1) sets out the provisions that "An application to set aside for irregularity ... any ... judgment or order (in the proceedings) shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity".

An application to set aside an irregular judgment under O. 2 r. 2 would not be allowed unless it is made within a reasonable time (see O. 2 r. 2(1)). But in *Muir v. Jenks, supra,* it was held (see the headnote at 412 and per Buckley LJ at 415) that delay on the part of the debtor to apply to set aside a judgment entered for too much would not deprive him of his right to have the judgment set aside. *Muir v. Jenks* was decided way back in 1913 long before O. 2 r. 2(1) took its present form. It is no longer the law today because O. 2 r. 2(1) as it is now provides that an application to set aside for irregularity any judgment or order shall not be allowed unless it is made within a reasonable time. And since 1 August 1993 (see

PU(A) 192/93), O. 42 r. 13 provides that all applications to set aside or vary any order or judgment under the RHC must be made and the applications served on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him. In *Singh v. Atombrook Ltd* [1989] 1 All ER 385, CA, a defendant who applied to set aside an irregular judgment three months after learning of the judgment was held to be too late to rely on O. 2 r. 2(1) to have the judgment set aside as of right. But the provisions of O. 2 r. 2(1) only apply to applications to set aside. So where judgment has been entered for too much, as in the present case, the court may amend the judgment sum under O. 2 r. 1(2) even though it is not permitted to set aside the judgment by O. 2 r. 2(1) because of unreasonable delay. Also, an application to set aside must be made before the party applying has taken any fresh step after becoming aware of the irregular judgment. A "fresh" step for the purpose of this rule (O. 2 r. 2(1)) is one sufficient to constitute a waiver of the irregularity (see the *Supreme Court Practice, 1997*, vol. 1, para. 2/2/3). This is how Edgar Joseph Jr FCJ put it in *Tuan Haji Ahmad Abdul Rahman v. Arab-Malaysian Finance Bhd, supra,* at 36:

> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms. Having said that, it should be added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (see O. 2 r. 2(1) of the Rules of the High Court.)

(2) Setting Aside Of Default Judgments Under Other Provisions Of The RHC

The case of *Singh v. Atombrook Ltd, supra,* clearly illustrates the point that where a defendant is not able to rely on O. 2 r 2(1) to have the judgment set aside because he could not fulfil the two preconditions in r. 2(1), he may still be able to have the judgment set aside by seeking the discretion of the court under another provision of the RHC. (But, in this country, this is now subject to O. 42 r. 13). This is what Kerr LJ said, *ibid* at 389:

> *It will be noted that under O. 2 r. 2(1) the grant of an application to set aside for irregularity is only permissible if it is made within a reasonable time. As already mentioned, the judge rightly took the view that the summons to set this judgment aside had not been issued within a reasonable time. Accordingly, as he held, the defendant was not entitled to have the judgment set aside under O. 2 as a matter of right.* He accepted, and I shall have to deal with this in

a moment, that the judgment had been obtained irregularly in two respects. First, there was no firm called Sterling Travel; the only relevant entity was 'Atombrook Limited, trading as Sterling Travel'. Second, the writ and subsequent proceedings had not been served at the registered address of Atombrook Ltd in Goswell Road but at an address in Rupert Street. *However, he held that while the defendant could accordingly not rely on O. 2 r. 2, he was willing in the circumstances to set aside the judgment under O. 13 r. 9, which provides that the court may set aside any judgment on such terms as it thinks just, which would include the default judgment in the present case.* (emphasis added)

And at 393, Kerr LJ concluded thus:

This is a case which falls plainly within the scope of the new O. 2 r. 1. The judgment had been obtained irregularly in the two respects to which I have referred. But it could still be amended, although it was a final judgment, both under O. 2 r. 1(2) and O. 20 r. 5. The defendant was not entitled to have it set aside as of right. It was only entitled to have it set aside, as it was, under O. 13 r. 9. ... and (the judge) was also entitled to amend the name of the defendant in the writ as he did.

In *Atombrook's* case the defendant could not rely on O. 2 r. 2 to set aside the default judgment because the judge rightly took the view that his application to set the judgment aside had not been made within a reasonable time. In the circumstances, the judge was only willing to set aside the judgment under O. 13 r. 9 which provides that the court may set aside any judgment on such terms as it thinks just. In the Court of Appeal (Kerr LJ and Sir John Megaw), Sir John Megaw said this, at 394, 395:

The judge thought it right to set aside the judgment on the basis that there was at least a possibility that the defendant had not had the opportunity to appear in court and put its case before judgment was entered, because it may not have had notice of the writ and of the proceedings by that time. If that is a possibility, then it could be an injustice that it should not have the judgment set aside and the opportunity to be heard and to put its defence.

There the Court of Appeal on recognising the irregularity in the misnomer of the name of the defendant exercised its powers under O. 2 r. 1(2) by taking the action of curing the irregularity by allowing the plaintiff to amend his writ even after final judgment in the proceedings had been entered for the purpose of substituting the defendant's correct name for the incorrect name in which it was sued. As for the irregularity regarding the non-compliance with s. 725(1) of the Companies Act 1985 that the writ was served on the defendant company at an address other than its registered office, the Court of Appeal did not consider the defect was so fundamental

that the judgment should be set aside on that ground. But the irregularity was enough for the court to hold that the defendant was entitled to have the default judgment set aside under O. 13 r. 9 because of the possibility that it could have been obtained in breach of rules of natural justice (ie, "that there was at least a possibility that the defendant had not had the opportunity to appear in court and put its case before judgment was entered, because it may not have had notice of the writ and of the proceedings by that time.").

A defendant may, instead of relying on O. 2 r. 2, seek the exercise of the discretion of the court by applying under another provision of the RHC for setting aside or varying a default judgment. Although in this country, he must now (ie, since 1 August 1993) make his application within the time constraints of O. 42 r. 13. As a general rule regular judgments are appealable but in the case of default judgments which have been regularly obtained, the rules permit applications to the court to have the default judgments set aside as the court thinks just but this will require merits to be shown. On the other hand, in the case of default judgments that have been irregularly obtained, it may be set aside (without reference to the merits of the case) or varied either under O. 2 r. 1(2) or under another provision of the rules that applies (see the examples given below).

In the case of a judgment entered in default of appearance, it may be set aside under O. 13 r. 8 as was done in *Singh v. Atombrook,* see above, where the default judgment was set aside under RSC O. 13 r. 9 (our RHC O. 13 r. 8). Order 13 r. 8 reads:

> 8. The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

A defendant who does not appear at the hearing of an application under O. 14 r. 1 may apply to have the judgment set aside under O. 14 r. 11. Rule 11 reads:

> 11. Any judgment given against a party who does not appear at the hearing of an application under rule 1 or rule 5 may be set aside or varied by the Court on such terms as it thinks just.

Similarly a judgment obtained against a defendant who does not appear at the hearing of an application under O. 81 r. 1 may be set aside or varied under O. 81 r. 7 by the court on such terms as it thinks just.

A judgment entered in default of defence may be set aside or varied under O. 19 r. 9. It reads:

> 9. The court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

Under O. 35 r. 2(1) "Any judgment or order obtained where one party does not appear at the trial may be set aside by the court, on the application of that party, on such terms as it thinks just". An application under this rule must be made within seven days after the trial (see r. 2(2)).

Applications To Set Aside Irregular Judgments Or Orders Under The Inherent Jurisdiction Of The Court Without Being Required To Have Recourse To The Rules That Deal Expressly With Proceedings To Set Aside Judgments Or Orders For Irregularity

Lord Diplock in *Issacs v. Robertson, supra,* has pointed out (at 103) "that there is a category of orders of (a court of unlimited jurisdiction) which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make." In this country we can also rely on O. 92 r. 4 which reads:

> 4. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

In fact it is Mr Lim's argument (when he realised that O. 2 r. 2(1) is against him) that his application was made under this rule (O. 92 r. 4).

Order 2 and all the other provisions in the RHC that deal expressly with proceedings to set aside judgments or orders do not extend to those judgments or orders obtained as a result of a failure to comply with statutory requirements. In regard to irregular judgments or orders they only deal with failures to comply with the requirements of the rules of the RHC. Although a judgment or an order obtained as a result of a failure to comply with the requirements of statutes is not covered by the RHC, a person affected by such an order is entitled to apply to have it set aside as of right (or *ex debito justitiae*) under the inherent jurisdiction of the court without his needing to have recourse to the rules of court that deal expressly with proceedings to set aside for irregularity as in O. 2 or elsewhere in the rules of the RHC. This remedy is reiterated in O. 92 r. 4. See *Badiaddin bin Mohd Mahidin v. Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, FC. This is how it was put by Gopal Sri Ram JCA at 425:

> It is true, as a general rule, that orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed. The decision of the Judicial Committee of the Privy Council in *Isaacs v. Robertson* [1985] AC 97 affirms the existence of the rule.

He continued at 426:

> It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law. *Isaacs v. Robertson* is certainly not authority for the latter proposition. I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside.

It is important to notice in Gopal Sri Ram JCA's judgment (above) that the judge was careful not to use the word "void" in reference to orders of a court of unlimited jurisdiction in the sense that they can be ignored or disobeyed with impunity. He said, at 426, "Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared **void** and set aside in proceedings brought for that purpose". As long as an irregular order stays it must be observed unless and until it is set aside. An irregular order, even where it has been described as "void" or "a nullity", stands as an effective order and cannot be ignored with impunity unless and until it is set aside. That is why Gopal Sri Ram JCA said this in *Tenaga Nasional Bhd v. Prorax Sdn Bhd, supra,* at 488: "It is settled law that the expressions "nullity", "void" and "voidable" are wholly inappropriate to describe an order made by a court of unlimited jurisdiction".

The present case is not a case where the court had acted in contravention of any statute when it gave judgment for the plaintiff in 1987. Therefore, Mr Lim's submission that he could rely on O. 92 r. 4 to have the judgment set aside because it was entered for too much is misconceived and I have no hesitation in rejecting it.

In the case of *Tuan Haji Ahmad Abdul Rahman v. Arab-Malaysian Finance Bhd, supra,* the Federal Court held that the default judgment was by reason of uncertainty, a nullity (see at 43 C) and this had entitled the defendant to have the irregular judgment set aside as of right. This is how Edgar Joseph Jr FCJ put it, at 42:

> We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the court has power to set aside a judgment in default, despite the defendant's application being out of time, if the particular circumstances of the case require the intervention of the court. (See *Beale v. McGregor* [1886] 2 TLR 311).

There the Federal Court was of the view that the default judgment was irregular for uncertainty and the impropriety of this was considered to be so serious as to entitle the defendant as of right, *ex debito justitiae*, to have the judgment set aside. The irregularity was so fundamental that it was not curable under O. 2 r. 1(2). (But according to Edgar Joseph Jr FCJ it was a nullity). Since the judgment could not be set aside under O. 2 r. 2 because the defendant's application was made out of time, the Federal Court set aside the judgment under its inherent jurisdiction instead to prevent abuse of its proceedings.

Conclusion

In the present case, it will be recalled, the plaintiff (the respondent) had obtained judgment against Lee (the appellant) after striking out his defence in an application under O. 18 r. 19 which was heard *inter partes*. That was on 16 February 1987. Lee did not appeal. Instead, some eight years later, in January 1995, he filed a summons to set aside the judgment.

If it had been a regular judgment then Lee's recourse was to appeal. But he did not appeal. Instead, he applied to have the judgment set aside which he could do if the judgment had been irregularly obtained. Lee claims the judgment was irregular because it was obtained for an amount in excess of what was due. In *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 Gopal Sri Ram JCA said at 482:

> Now, it is an established principle that in monetary claims, the amount for which judgment is entered must be limited to the amount actually due: *Hughes v. Justin* [1894] 1 QB 667, *Muir v. Jenks* [1913] 2 KB 412. ... If judgment is entered for more than is actually due, it is liable to be set aside. If an error appears in the judgment then this may be corrected in the following circumstance:
>
> (i) on an application duly made by the plaintiff in that behalf: *Armitage v. Parsons* [1908] 2 KB 410;
>
> (ii) on an application made by the defendant to set aside the judgment: *Ban Hin Lee Bank Bhd v. Somali Bank* (The Independent, 28 November 1988), CA; and
>
> (iii) *ex parte*, where the defendant consents to such a course.

The above dicta regarding the circumstances on which an error in the judgment amount may be corrected require some explanation lest it be misunderstood. If judgment was obtained for the wrong amount, it is true the **plaintiff** may apply to have the judgment amount corrected. This is because O. 2 r. 1(2) empowers the court "to allow such amendments (if any) to be made". Strictly speaking, the authority for this is not *Armitage v. Parsons* [1908] 2 KB 410 which is an old case decided long before O. 2 took its present form but is the rule (r. 1(2)) itself which empowers the court to amend. But on an application made by the **defendant** to set aside the judgment because it was entered for too much, the court may under O. 2 r. 1(2) set aside either wholly or in part the judgment or (regardless of who had initiated the application to set aside) exercise its powers under the RHC "to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit". Compare this with the previous position under the old cases of *Hughes v. Justin* [1894] 1 QB 667 and *Muir v. Jenks, supra,* where the law was that unless the party who held the judgment applied to have the incorrect sum put right, the defendant was (upon the authority of *Hughes v. Justin*) entitled as of right to have the judgment for the incorrect amount set aside. See Buckley LJ in *Muir v. Jenks, supra,* at 417 where he said:

> ... *Hughes v. Justin* is an authority for the following proposition: If the plaintiff in the absence of the defendant, proceeding properly under the rules, signs judgment for a sum in excess of that which is due to him, the defendant is entitled to have that judgment set aside, unless the party who holds the judgment applies as he may to reduce it to the proper amount. If application to amend be duly made it may be right not to set the judgment aside but to reduce it to the proper sum; but unless the party who holds the judgment elects to have it put right, then upon the authority of *Hughes v. Justin* it seems to me the defendant is entitled to say "This is a wrong judgment, set it aside." In the case of *Armitage v. Parsons* the right to amend which I have mentioned was exercised.

There was then no power as there is now in O. 2 r. 1(2) for the court to allow amendments to be made without regard to who had initiated the application to have the judgment set aside.

In the present case, unfortunately for him, Lee's only recourse was to apply under O. 2 r. 2 to have the irregular judgment set aside. He was unable to apply under any other provision of the RHC because the judgment that had been obtained against him was not a default judgment. In this appeal we are unanimous in our opinion that he was not entitled to have the judgment, even though it was irregular, set aside under O. 2 r. 2 because we are of the view that his summons to set this judgment aside had not been issued within a reasonable time (see O. 2 r. 2(1)). By allowing eight

years to elapse after the irregular judgment had been obtained against him before taking action on it has, in our judgment, precluded him from being allowed to have the judgment set aside because of his unreasonable delay in making his application (O. 2 r. 2(1)). The judge below was right to have dismissed the application. We have, therefore, affirmed his decision and dismissed the appeal. But now, since the matter has been brought to our attention, this court on recognising the irregularity of the incorrect amount on the judgment, has the power under O. 2 r. 1(2) to correct the error in the judgment by amending it to the correct amount regardless of who had initiated the application to have the judgment set aside. This we do by correcting the judgment sum to the amount that is due.

The error arose in this way. I will let the judge below take up the story. This is what Charles Ho J said:

> It is conceded by Miss Willie that the amount of tax indemnity should not have been included in the judgment sum of RM1,211,523.66. The mistake arose in this way. At the time the Plaintiff instituted the action they were entitled to include the claim for tax indemnity in respect of the leased equipment because if the leased equipment were disposed of or sold within 2 years they would have to pay the Government for the capital allowance. However, by the time they obtained judgment on 16th February, 1987, the 2 years period had elapsed and the Plaintiffs were no longer liable to pay the Government the capital allowance. Thus, the Plaintiffs (were) no longer entitled then to make the claim for tax indemnity against the Defendants. This fact seemed to have escaped the attention of both the parties and the Court during the hearing of the O. 18 r. 19 application.
>
> It is not disputed that when the mistake was discovered the solicitors for the Plaintiffs on 11.7.89 wrote to the then solicitors of the 3rd Defendant, Messrs David Fung & Co. to notify them that the original judgment sum has been reduced by the amount of the tax indemnity ie, the sum of RM93,362.37 and the 3rd Defendant's solicitors acknowledged this on the same date. The Plaintiffs in their execution proceedings have never sought to enforce this part of the judgment. This is reflected in the statements of account rendered to the 3rd Defendant. In the circumstance the Defendants have not been prejudiced or made to suffer any loss as a result of the mistake.

This is plainly a case where we should put the matter right and this we do by amending the judgment to reflect the correct amount, which is RM1,117,161.29 (1,211,523.66 – 93,362.37).

Abu Mansor Ali JCA:

I have had the opportunity of reading the draft judgments of my brothers, Dato' Chan Nyarn Hoi, JCA and Dato' Ahmad Fairuz Sheikh Abdul Halim, JCA and I agree with them that the appeal should be struck out since the application of the appellant to set aside the default judgment was tainted by unreasonble and unexplained delay.

YA Dato' Fairuz's judgment had answered all points raised by the appellant whilst YA Dato' Chan's judgment has explained in detail that the term nullity, in the present context, is no longer available.

Judgments to be set aside can either be irregular or regular judgments. Irregular judgments may be set aside by the court that gave the judgments and regular judgments can only be set aside by an appellate court. Then lastly I wish to commend YA Dato' Chan for taking time to write a lengthy judgment some twenty days before going on retirement instead of being on leave prior to.

Ahmad Fairuz JCA:

The appellant was one of the defendants in a suit instituted by the respondent/plaintiff in the High Court of Sabah and Sarawak at Kota Kinabalu. The claim of the respondent was for arrears of rental under a leasing agreement. On an application made by the respondent under O. 18 r. 19 of the Rules of the High Court 1980 (hereinafter referred to as RHC), the High Court struck out the defence of the defendants and gave judgment against the defendants in the sum of RM1,211,523.66 (hereinafter referred to as "the said judgment"). No appeal was lodged against the said judgment. The respondent then commenced execution proceedings. The appellant, by way of a summons-in-chambers, applied for an order of the court to stay all execution proceedings and to set aside the said judgment. When the application was heard, the appellant abandoned his prayer for stay and proceeded only with the prayer for setting aside the said judgment. On 10 June 1997, the High Court dismissed the appellant's application. Against this decision, the appellant now appeals to this court.

The appeal was heard and dismissed by this court on 25 February 1998. I now give my reasons for dismissing the appeal.

The first issue taken up by the appellant pertains to the contention that the High Court has no power to grant interest of 18% per annum on the judgment sum. On this, the learned High Court judge had referred to the amendment to O. 42 r. 12 RHC which came into force on 11 December 1986. The amendment clearly empowers the High Court to order an interest

above 8% per annum if the rate has been agreed upon by the parties. And the learned judge stated in his judgment that cl. 12 read with item 9 of the schedule to the lease agreement enabled him to make the order that he had made. As the order was made on 16 February 1987, it is therefore clear that the amendment to O. 42 r. 12 RHC applied. Consequently, I hold that there is no merit in this argument.

The next argument advanced by the appellant was on the inclusion of tax indemnity in the judgment sum. The appellant argued that it was wrong for the respondent to include the tax indemnity in the judgment sum. This, according to the appellant, caused the judgment to be a nullity and it ought therefore be set aside. The appellant referred us to the case of *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari b. Abdul Rahman* [1995] 4 CLJ 127 CA which dealt with a default judgment that contained terms which were different from the prayers in the statement of claim. The damages stipulated in the default judgment were more than the amounts prayed for. The Court of Appeal consequently held that the default judgment was irregular and the appellant therein was entitled to have it set aside *ex debito justitiae*. Before the High Court, the appellant had submitted a number of authorities which show how judgments for sums bigger that what has been claimed had been set aside on the ground of irregularity or nullity. The High Court, however, held that the authorities deal with setting aside of judgments in default. And I agree with the High Court that the authorities and the case of *Cheow Chew Khoon (supra)* are consequently irrelevant to the issue before thic court as the judgment here was pursuant to an *inter partes* hearing. Furthermore, as pointed out by the learned judge in his judgment, the respondent's solicitor had notified the appellant's solicitors that the judgment sum had been reduced by the amount of the tax indemnity. The respondent, in fact, had never sought, in their execution proceedings, to enforce the judgment sum that included the sum of the tax indemnity. In the circumstances I agree with the learned judge when he held that the appellant had not been in any way prejudiced or made to suffer any losses as a result of the mistake of including the tax indemnity sum into the judgment sum. As such I have to hold that this argument on tax indemnity matter has no merit too.

The final issue taken up by the appellant revolves on the appellant's delay of about eight years before he came to the High Court to apply to set aside the judgment. The appellant relied on the case of *Tuan Haji Ahmad Abdul Rahman v. Arab-Malaysian Finance Bhd.* [1996] 1 CLJ 241 wherein the Federal Court held that under the court's inherent jurisdiction to prevent abuse of its proceedings, the court has power to set aside the judgment in default, despite the appellant's application being out of time.

In the case of *Tuan Haji Ahmad Abdul Rahman (supra)* the delay was about three years. The Federal Court agreed with the trial judge that the explanation given for the delay was a "ludicrous" explanation and consequently unacceptable. The Federal Court then said:

> Nevertheless, it is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that:
>
> (a) no one has suffered prejudice by reason of the defendant's delay;
>
> (b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or
>
> (c) to let the judgment to stand would constitute oppression. (See *Atwood v. Chichester* [1878] 3 QBD 722;
> *Harley v. Samson* [1914] 30 TLR 450.)
>
> We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the court has power to set aside a judgment in default, despite the defendant's application being out of time, of the particular circumstances of the case require the intervention of the court. (See *Beale v. McGrego*r [1886] 2 TLR 311.) ...
>
> ... In our view, having regard to the principles enunciated above, on when the court can condone delay on the part of a defendant, the tardiness or the laches of the appellant in making his application, to set aside this default judgment, was not fatal to his application, especially since, in our view, the default judgment was by reason of uncertainty, a *nullity*, and the amendment made by the judge to it by deleting the words "on monthly rests", did not cure that defect.

In the appeal before this court no explanation at all was given for the delay. There were no particular circumstances in the appeal that could entitle me to ignore the delay and proceed in the way that the Federal Court did in the case of *Tuan Haji Ahmad Abdul Rahman (supra)*. Consequently, I agree with the learned judge that the appellant's application should be dismissed on the ground of delay on the part of the appellant.